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Court of Appeals No. 61835-1-I

83923-9

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

IN RE PERSONAL RESTRAINT PETITION

STATE OF WASHINGTON, Respondent,

v.

SALVADOR HERNANDEZ RIVERA, Petitioner.

PETITIONER'S REPLY BRIEF

Salvador Hernandez Rivera
Petitioner Pro Se (DOC #790179)
Stafford Creek Corrections Center
191 Constantine Way (H1B122)
Aberdeen, Wa 98520

TABLE OF CONTENT:

TABLE OF AUTHORITIES

FEDERAL CASES:

WASHINGTON STATE CASES:

TABLE OF AUTHORITIES (CON'T)

WASHINGTON STATE CASES:

TABLE OF AUTHORITIES (CON'T)

A. STATUS OF PETITIONER

Petitioner, Salvador Rivera, is restrained pursuant to a judgment and sentence entered on December 15, 1998, in the Whatcom County Superior Court, Cause No. 98-1-00289-4. On June 4, 2008, Petitioner filed a motion in that Court to vacate his sentence and on June 5, 2008, The Honorable Charles R. Snyder made findings of facts and conclusions of law, and issued an order transferring the motion to the Court of Appeals for consideration as a personal restraint petition. CP No. 109, 110. The Court of Appeals filed the case (COA No. 61835-1-I), and on October 16, 2008, the State filed a response. Petitioner submits this reply in response thereto.

B. DISPUTED AND UNDISPUTED FACTS

1. The only contested issues in this case are procedural. Mr. Rivera argued that his sentence is invalid and the sentence should be vacated and remanded for resentencing on the deadly weapon enhancement because the imposition of a firearm enhancement without the jury finding that he was armed with a firearm beyond a reasonable doubt violates the Sixth Amendment's notice and jury trial guarantees, and the Fourteenth Amendment's Due Process Clause.

2. The State responded that, at the time the

Court imposed the sentence, it was well within its authority to impose the firearm enhancement pursuant to RCW 9.94A.125 and RCW 9.94A.310(3)(a).

3. The State disputes whether Mr. Rivera may be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.

4. The State does not dispute that it filed an Information charging Mr. Rivera with First Degree Murder while armed with a deadly weapon, rather than a firearm.

5. The State does not dispute that, for purposes of a special verdict, the jury was instructed, in Instruction #37, to make a specific finding that Mr. Rivera was armed with a deadly weapon, and not a firearm, at the time of the commission of the crime.

6. The State does not dispute that the jury returned a special verdict finding that Mr.Rivera was armed with a deadly weapon, and not a firearm, at the time of the commission of the crime.

7. The State does not dispute that the

Information did not contain an allegation that a firearm enhancement applied, nor did the jury return a special verdict concluding that Mr. Rivera was armed with a firearm.

8. The State does not dispute that Mr. Rivera was sentenced to a 60-month firearm enhancement, rather than 24-month deadly weapon enhancement, and that the error in Mr. Rivera's case occurred at sentencing when the court made a firearm finding on the basis of a jury's deadly weapon finding.

C. ARGUMENT IN REPLY

1. Petitioner, Mr. Rivera's Restraint Is Unlawful. The restraint of Petitioner, Mr. Rivera, is unlawful for one or more of the following reasons pursuant to RAP 16.4(c):

> The ... sentence ... was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington;
>
> Material facts exist which have not been previously presented or heard, which in the interest of justice require vacation of the ... sentence ...;
>
> There has been a significant change in the law, whether substantial or procedural, which is material to the ... sentence ... and sufficient reasons exist to require retroactive application of the changed legal standard;

Other grounds exist to challenge the legality of the restraint of petitioner.

RAP 16.4(c)(2)(3)(4)(7).

Mr. Rivera has made a showing that his restraint is unlawful because: (1) the Sixth Amendment guarantees him the right to a jury trial and this right entitles him to a jury determination of every contested fact authorizing a punishment; (2) the sentencing court was only authorized to impose sentence based solely on the jury's verdict finding; (3) he may not be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone; (4) there has been an intervening opinion by the Washington Supreme Court[1] which has effectively overturned prior appellate decisions[2]

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1 State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008).

2 State v. Meggyesy, 90 Wn.App. 693, 958 P.2d 319 (1998), rev. den., 136 Wn.2d 1028 (1998).

State v. Olney, 97 Wn.App. 913, 987 P.2d 662 (1999).

State v. Rai, 97 Wn.App. 307, 983 P.2d 712 (1999).

that was originally determinative of the issues presented, and (5) he could not have argued the issues before the publication of the new decision.

2. This Petition Is Timely Filed. While the general rule is that a "collateral attack" on a judgment and sentence must be filed within one-year of the date the judgment becomes final, RCW 10.73.090 is subject to the following exceptions:

> "The Sentence imposed was in excess of the Court's jurisdiction."

See RCW 10.73.100(5). This claim theoretically invokes consideration under the illegal sentence exception to the RCW 10.73.090(1) one-year time bar for collaterally attacking the judgment. See In re Runyan, 121 Wn.2d 432, 440, 853 P.2d 424 (1983)(The one-year time limit for filing is not a blanket limitation. Broad exceptions are given for ... sentences in excess of the court's jurisdiction ...); See also, Powell v. Lambert, 357 F.3d 871 (9th Cir. 2004)(Washington Courts have an independent duty to decide sentence claims whenever they are raised: ... When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence

when the error is discovered)(citing In re Stoudmire, 141 Wn.2d 342, 5 P.3d 1240, 1247 (2000)).

Remand for resentencing is the appropiate remedy to correct an illegal sentence. "When a trial court exceeds its sentencing authority ... it commits reversible error." State v. Hale, 94 Wn.App. 46, 53, 971 P.2d 88 (1999). The remedy for erroneous sentences is remand to the trial court for resentencing. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004).

Another exception is where:

> "There has been a significant change in the law, whether substantial or procedural, which is material to the ... sentence ... and sufficient reasons exist to require retroactive application of the changed legal standard."

RCW 10.73.100(6). The Washington Supreme Court's decision in State v. Recuenco, supra, which held that under Washington law, "it can never be harmless to sentence someone for a crime not charged, not sought at trial, and not found by a jury[,]" Recuenco, 163 Wn.2d at 442, constitutes a significant change in law.

i. Recuenco Is An Intervening Opinion. The Supreme Court, in In re Greening, 141 Wn.2d 687, 697,

9 P.3d 206 (2000), held "that where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a 'significant change in the law' for purposes of exemption from procedural bars."

The Supreme Court overturned cases that allowed judges to impose firearm enhancements where juries found only the presence of deadly weapons, finding that such errors are not harmless under Washington law.

ii. Petitioner Could Not Have Argued This Issue Earlier. Another test for determining whether a decision constitutes "a significant change in law" is whether the defendant could have argued the issue before publication of the new decision. In re Stoudmire, 145 Wn.2d 258, 264, 36 P.3d 1005 (2001).

Mr. Rivera could not have made this argument before the Supreme Court's decision in State v. Recuenco, supra. Thus, Recuenco constitutes "a significant change in the law" under Greening and Stoudmire.

The Supreme Court's decision in In re Jeffries, 114 Wn.2d 485, 789 P.2d 731 (1990), and in In re Vandervlugt, 120 Wn.2d 427, 842 P.2d 950 (1992), support petitioner's argument that Recuenco constitute a significant change in the law.

In Jeffries, the Supreme Court said that, in determining whether there has been a material change in the law, the court will assess whether new decisions have provided them with an opportunity to refine their analysis and a larger pool of cases under which they may assess a petition. Jeffries, 114 Wn.2d at 489.

And in Vandervlugt, the Supreme Court found a significant change in the law where the court decided a pair of cases that presented an issue of first impression in between patitioner's direct appeal and personal restraint petition that affect his conviction. Vandervlugt, 120 Wn.2d at 433-34.

Recuenco broke new ground in holding that, under Washington law, "it can never be harmless to sentence someone for a crime not charged, not sought at trial, and not found by a jury." Recuenco,163 Wn.2d

at 442. This argument was not available prior to the Supreme Court's decision in Recuenco and Petitioner should not be faulted for having failed to make an argument that was essentially unavailable on his direct appeal. See Greening, 141 Wn.2d at 696-97 (the court does not fault petitioners "for having omitted arguments that were essentially available at the time ...").

Mr. Rivera is entitled to relief on the merits under RAP 16.4(c) and his petition meets the broad exceptions provided in RCW 10.73.100. Also, the Court has discretion to consider issues where the appellate brief contains a clear challenge to a trial court ruling and is accompanied by argument and relevant citation to authority. See State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995); RAP 1.2(a).

3. The Error In Recuenco Is Structural. The error in Recuenco, supra is structural, and not harmless, because it "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself." See Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Judicial fact-finding is a trial

error that violates a defendant's Sixth Amendment right to a jury trial. Id., 499 U.S. at 306-07. The error require authomatic reversal.

Authomatic reversal is required when a constitutional error can be characterized as a structural defect. Structural defects defy harmless error analysis because they undermine the framework of the trial process itself, their effect cannot be ascertained without resort to speculation, or the question of harmlessness is irrelevant based on the nature of the right involved. United States v. Gonzales-Lopez, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

In the present case, the question presented was raised and decided by the Washington Supreme Court in State v. Recuenco, supra: Whether Washington law requires a harmless error analysis where a sentencing factor, such as imposition of a firearm enhancement based on a deadly weapon finding, was not submitted to the jury? The court concluded that under Washington law, harmless error analysis does not apply in these circumstances. In both cases the error occurred when the trial judge imposed a sentence

enhancement for something the State did not ask for and the jury did not find. The trial court simply exceeded its authority in imposing a sentence not authorized by the charges.

Mr. Rivera has a right to have the jury find the existence of any particular fact that the law made essential to his punishment as the Sixth Amendment requires any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a jury verdict must be proved by a jury beyond a reasonable doubt. The jury found only that Mr. Rivera was armed with a deadly weapon, and not afirearm, during the commission of the crime. Mr. Rivera should be resentenced to the deadly weapon jury finding.

4. Petitioner's Constitutional Right Of Trial By Jury Was Violated. The Sixth Amendment guarantees a criminal defendant the right to a jury trial. U.S. Const.amend VI. This right entitles a criminal defendant to a jury determination of every contested fact authorizing a punishment. United States v. Gaudin, 515 U.S. 506, 510, 132 L.Ed.2d 444, 115 S.Ct.

2310 (1995).

In Sullivan v. Louisiana, 508 U.S. 275, 277, 113 S.Ct. 2078, 2080, 124 L.Ed.2d 182 (1993), the United States Supreme Court noted the jury fact finding function has a Sixth Amendment dimension:

> "The Sixth Amendment provides that 'in all ciminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...' We [have] found this right to trial by jury in serious criminal cases to be 'fundamental to the American scheme of Justice', and therefore applicable in State proceedings. The right includes, of course, as its must important element, the right to have the jury, rather than the Judge, reach the requisite finding of 'guilty'".

Sullivan, 508 U.S. at 277. This constitutional right extends to sentencing factors that "must be submitted to a jury rather than decided by a trial judge." Gaudin, 515 U.S. at 510.

i. Facts Reflected In The Jury's Verdict.

The right of trial by jury shall remain inviolate. Wash.Const. art. I, sec. 21. The essence of the constitutional right to trial by jury is the jury's fact finding province/function. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 644-45, 771 P.2d 711; 780 P.2d 260 (1989).

A defendant may not be exposed to a penalty

exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone. Ring v. Arizona, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.ed.2d 556 (2002); Apprendi v. New Jersey, 530 U.S. 466, 483, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

The relevant statutory maximum is the maximum punishment the sentencing court is authorized to impose based solely on the jury's verdict finding. Ring, 536 U.S. at 597.

In this case that facts reflected in the jury's verdict is that Mr. Rivera was armed with a "deadly weapon" and not a "firearm" at the time of the commission of the crime. Therefore, Mr. Rivera should have been sentenced to the deadly weapon enhancement rather than the firearm enhancement that he received.

5. Recuenco's Analysis. In State v. Recuenco, supra, the Supreme Court found it necessary to focus on what error occurred in that case and how the claim of error evolved. The Court said to determine where the claim of error began, the initial inquiry focused on the information specifying the charges. The Court

said that the State has the authority and responsibility for bringing charges against a person. In that regard, the State possesses wide discretion to choose the charges it wants to pursue, if any.

The Court said that its cases have required the State to include in the charging documents the essential elements of the crime alleged. City of Auburn v. Brook, 119 Wn.2d 623, 627, 836 P.2d 212 (1992). The essential elements rule requires a charging document allege facts supporting every element of the offense and identify the crime charged. State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). "Elements" are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime. State v. Johnstone, 96 Wn.App. 839, 844, 982 P.2d 119 (1999). The purpose of the essential elements rule is to provide defendants with notice of the crime charged and to allow defendants to prepare a defense. State v. Campbell, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995).

Mr. Rivera's case, as in Recuenco, also involves a charging decision made by the State. The prosecutor chose to charge the lesser enhancement of "deadly

weapon." This provided Mr. Rivera with notice of the charged offense and the ability to prepare a defense, as required by our state and federal constitutions. Moreover, consistent with the specific charge brought, the jury was instructed on the deadly weapon enhancement and specifically found Mr. Rivera guilty of the charged crime while armed with a deadly weapon.

As noted above, there is no error in the information at all; the State alleged that Mr. Rivera was armed with a deadly weapon where it could have alleged a firearm enhancement or not sought any enhancement at all. That was the choice of the State at the time it filed the information. No error occurred in the jury's findings. In fact, it was not until Mr. Rivera was sentenced for an enhancement that was not charged nor found by the jury that any error had occurred at all.

As the Supreme Court said in Recuenco, supra, under former RCW 9.94A.125 and former RCW 9.94A.310, the jury could have been instructed to make a firearm finding, as an examination of these statutes made clear.

In Mr. Rivera's case the only instruction given to the jury regarding sentencing enhancements was the special verdict for a deadly weapon. It was only after

the jury's verdict, at Mr. Rivera's sentencing, that the trial court imposed a five year firearm enhancement. Thus, the sentencing judge committed error by imposing a sentence outside the judge's authority, a sentence that was not authorized by the jury.

6. Failure To Resentence Petitioner Violates The Equal Protection Clause Of The Fourteenth Amendment. The state and federal equal protection clauses guarantee similarly situated persons like treatment under the law. State v. Manussier, 129 Wn.2d 652, 672, 921 P.2d 473 (1996), Cert. denied, 520 U.S. 1201 (1997).

In the present case and in Recuenco case, the trial judge made judicial factfinding which deprived them of their due process rights because a firearm enhancement was imposed despite the jury finding that they were armed with a deadly weapon.

i. Mr. Rivera and Recuenco Are Persons Similarly Situated. Equal protection requires that persons similarly situated with respect with the legitimate purpose of the law receive like treatment. State v. Simmons, 152 Wn.2d 450, 458, 98 P.3d 789 (2004). But this does not guarantee criminal defendants complete quality. Id. It instead guarantees that the law will be applied equally to persons 'similarly

situated.' State v. Handley, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990); State v. Manro, 125 Wn.App. 165, 175, 104 P.3d 708 (2005), review denied, ___ Wn.2d ___ (Wash. Oct. 5, 2005)(No. 767-0-6); State v. Rushing, 77 Wn.App. 356, 359, 890 P.2d 1077 (1995). The challenger must then show that he is 'similarly situated' with other persons who have received different treatment. Handley, 115 Wn.2d at 289-90; Manro, 125 Wn.App. at 175; Rushing, 77 Wn.App. at 359.

Similarly situated means near identical participation in the same set of criminal circumstances. Handley, 115 Wn.2d at 290; Rushing, 77 Wn.App. at 359-60. In this defining moment the court must determine whether Petitioner's constitutional right to equal protection has been violated.

The error in State v. Recuenco, supra, is not subject to harmless-error analysis as determined by the Supreme Court. Both Recuenco and Mr. Rivera are similarly situated and have near identical participation in the same set of circumstances, and should receive like treatment under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Because Recuenco was resentenced, so should Mr. Rivera.

D. CONCLUSION

Mr. Rivera was charged with murder in the first degree with a deadly weapon enhancement, and he was convicted of murder with a deadly weapon enhancement, but he was erroneously sentenced with a firearm enhancement. The Supreme Court concluded in State v. Recuenco, supra that it can never be harmless to sentence someone for a crime not charged, not sought at trial, and not found by a jury. In this situation, harmless error analysis does not apply. Therefore, Recuenco constitutes a significant change in the law and Mr. Rivera's sentence should be vacated and he should be remanded for resentencing to a deadly weapon enhancement.

Dated this 16 day of december, 2008.

Salvador Rivera

Salvador Rivera, 790179
Petitioner Pro Se
Stafford Creek Corr. Ctr.
191 Constantine Way
Aberdeen, Wa 98520

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, Salvador Rivera, declare and say:

That on the 16 day of December, 20 08, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. _____:

(1) Petitioner's Reply brief.

_____;

_____;

_____;

_____;

_____.

addressed to the following:

Court of Appeals of the State
of Washington - Division One
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Seattle, Wa 98101-1176

Whatcom County Prosecutor's
Office
Hilary A. Thomas
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Bellingham, Wa 98225

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 16 day of December, 20 08, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Salvador Rivera
Signature

Salvador Rivera
Printed Name

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